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6 **UNITED STATES DISTRICT COURT**  
7 **WESTERN DISTRICT OF WASHINGTON**  
8 **AT SEATTLE**

9 MELISSA A. JOHNSON,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of  
Social Security,

13 Defendant.

NO. C11-5668-RAJ-JPD

REPORT AND  
RECOMMENDATION

14 Plaintiff Melissa A. Johnson appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) which denied her application for Supplemental  
16 Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f,  
17 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the  
18 Court recommends that the Commissioner’s decision be REVERSED and REMANDED for  
19 further administrative proceedings.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff was born in 1981, and was twenty-six years old when she filed her application  
22 for SSI benefits. Administrative Record (“AR”) at 134. She has sixth grade education. AR at  
23 143. Her past work experience includes employment as a kitchen helper, housekeeper, and  
24 waitress. AR at 63, 146. Plaintiff was last gainfully employed in April 2005. AR at 146.

1 On July 21, 2008, plaintiff filed a claim for SSI benefits, alleging disability beginning  
2 October 15, 2006. AR at 134-36. Plaintiff subsequently amended her alleged onset date to  
3 December 29, 2008, the date she completed substance abuse treatment. AR at 14, 36. Plaintiff  
4 asserts that she is disabled due to degenerative disc disease of the lumbar spine, hepatitis C,  
5 depression, anxiety, and a history of substance abuse. AR at 16.

6 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 74-77,  
7 81-82. Plaintiff requested a hearing which took place on May 27, 2010. AR at 35-70. On June  
8 18, 2010, the ALJ issued a decision finding plaintiff not disabled. AR at 14-28. Plaintiff's  
9 administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 1-3,  
10 making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42  
11 U.S.C. § 405(g). On August 24, 2011, plaintiff timely filed the present action challenging the  
12 Commissioner's decision. Dkt. No. 3.

## 13 II. JURISDICTION

14 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
15 405(g) and 1383(c)(3).

## 16 III. STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
18 social security benefits when the ALJ's findings are based on legal error or not supported by  
19 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir.  
20 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such  
21 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
22 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
23 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical  
24 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d

1 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
2 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas*  
3 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than  
4 one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

5 The Court may direct an award of benefits where "the record has been fully developed  
6 and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*,  
7 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir.  
8 1996)). The Court may find that this occurs when:

9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
10 claimant's evidence; (2) there are no outstanding issues that must be resolved  
11 before a determination of disability can be made; and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

12 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
13 erroneously rejected evidence may be credited when all three elements are met).

#### 14 IV. EVALUATING DISABILITY

15 As the claimant, Ms. Johnson bears the burden of proving that she is disabled within the  
16 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
17 1999). The Act defines disability as the "inability to engage in any substantial gainful activity"  
18 due to a physical or mental impairment which has lasted, or is expected to last, for a continuous  
19 period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant  
20 is disabled under the Act only if her impairments are of such severity that she is unable to do her  
21 previous work, and cannot, considering her age, education, and work experience, engage in any  
22 other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A);  
23 *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for  
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any  
5 step in the sequence, the inquiry ends without the need to consider subsequent steps.

6 Step one asks whether the claimant is presently engaged in “substantial gainful activity.”<sup>1</sup>  
7 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is, disability benefits are denied. If she is not, the  
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one or  
9 more medically severe impairments, or combination of impairments, that limit her physical or  
10 mental ability to do basic work activities. If the claimant does not have such impairments, she is  
11 not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
12 impairment, the Commissioner moves to step three to determine whether the impairment meets  
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed  
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work to  
20 determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the  
21 claimant is able to perform her past relevant work, she is not disabled; if the opposite is true, then

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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 the burden shifts to the Commissioner at step five to show that the claimant can perform other  
2 work that exists in significant numbers in the national economy, taking into consideration the  
3 claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g);  
4 *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform  
5 other work, then the claimant is found disabled and benefits may be awarded.

## 6 V. DECISION BELOW

7 On July 18, 2008, the ALJ issued a decision finding the following:

- 8 1. The claimant has not engaged in substantial gainful activity since December 29,  
9 2008, the amended alleged disability onset date.
- 10 2. The claimant has the following severe impairments: degenerative disc disease of  
11 the lumbar spine, hepatitis C, depression, anxiety, and a history of substance  
12 abuse.
- 13 3. The claimant does not have an impairment or combination of impairments that  
14 meets or medically equals one of the listed impairments in 20 CFR Part 404,  
15 Subpart P, Appendix 1.
- 16 4. After careful consideration of the entire record, the undersigned finds that the  
17 claimant has the residual functional capacity to perform light work as defined in  
18 20 CFR 416.967(b). The claimant is able to lift and carry 20 pounds occasionally  
19 and 10 pounds frequently, stand and walk about 6 hours in an 8 hour day, and sit  
20 for at least 6 hours in an 8 hour day. The claimant is able to do occasional  
21 crouching, crawling, stooping, balancing, kneeling, and climbing of ramps and  
22 stairs. However, the claimant is unable to climb ladders, ropes, and scaffolds.  
23 She is unable to do any commercial driving or work around hazards such as  
24 unprotected heights, dangerous or moving machinery, or open flames. Mentally,  
the claimant is limited to one or two step unskilled, simple, repetitive tasks.  
Although she is able to have occasional contact with co workers and supervisors,  
she is unable to have public contact. The claimant is unable to tolerate  
occupational exposure to drugs or alcohol, and she is limited to jobs requiring  
only occasional adaptation to workplace change. She is further limited to  
performing low stress jobs which do not involve strict production quotas such as  
those found in assembly line work.
5. The claimant is unable to perform any past relevant work.



1 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may not be  
2 rejected without “‘specific and legitimate reasons’ supported by substantial evidence in the  
3 record for so doing.” *Id.* at 830 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

4 The ALJ may reject physicians’ opinions “by setting out a detailed and thorough  
5 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
6 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Rather than merely  
7 stating his conclusions, the ALJ “must set forth his own interpretations and explain why they,  
8 rather than the doctors’, are correct.” *Id.* Such conclusions must at all times be supported by  
9 substantial evidence. *Id.*

10 Opinions from non-examining medical sources are to be given less weight than treating  
11 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
12 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
13 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
14 Security Ruling (“SSR”) 96–6p, 1996 WL 374180, at \*2. Although an ALJ generally gives more  
15 weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a non-  
16 examining doctor’s opinion may nonetheless constitute substantial evidence if it is consistent  
17 with other independent evidence in the record. *Thomas*, 278 F.3d at 957; *Orn v. Astrue*, 495  
18 F.3d 625, 632–33 (9th Cir. 2007).

19 Less weight may be assigned to the opinions of other sources. *Gomez v. Chater*, 74 F.3d  
20 967, 970 (9th Cir. 1996). However, “[s]ince there is a requirement to consider all relevant  
21 evidence in an individual’s case record,” the ALJ’s decision “should reflect the consideration of  
22 opinions from medical sources who are not ‘acceptable medical sources’ and from ‘non-medical  
23 sources’ who have seen the claimant in their professional capacity.” SSR 06-03p. “[T]he  
24 adjudicator generally should explain the weight given to opinions from these ‘other sources,’ or

1 otherwise ensure that the discussion of the evidence in the determination or decision allows a  
2 claimant or subsequent reviewer to follow the adjudicator’s reasoning, when such opinions may  
3 have an effect on the outcome of the case.” *Id.*

4 Plaintiff argues that the ALJ failed to properly evaluate the opinions of Kimberly  
5 Wheeler, Ph.D., Keith Kruger, Ph.D., Jeff Bremer, Ph.D., and Michael Regets, Ph.D., regarding  
6 her mental impairments; and the opinions of Allen Sinclair Chen, M.D., James F. Kruidenier,  
7 M.D., and Michael P. Myers, PA-C, regarding her physical impairments. Dkt No. 12 at 3–13.  
8 The Commissioner does not respond directly to plaintiff’s arguments, and instead argues only  
9 that the ALJ’s interpretation of the conflicting medical evidence was reasonable and cannot be  
10 second-guessed. Dkt. No. 15 at 8.

11 1. *Kimberly Wheeler, Ph.D., Keith Kruger, Ph.D., and Jeff Bremer, Ph.D.*

12 Examining psychologist Kimberly Wheeler, Ph.D., evaluated plaintiff on three occasions  
13 for the Washington State Department of Social and Health Services (“DSHS”). AR at 202-27,  
14 352-64. On September 20, 2007, Dr. Wheeler diagnosed methamphetamine dependence,  
15 cannabis dependence, attention deficit hyperactivity disorder (“ADHD”) combined type, and  
16 mood disorder NOS. AR at 213. She suggested bipolar disorder was unlikely as plaintiff did not  
17 present with hallmark symptoms of mania. *Id.* She opined that plaintiff had “marked”  
18 limitations in her ability “to relate appropriately to co-workers and supervisors,” and “to control  
19 physical or motor movements and maintain appropriate behavior,” and “severe” limitations in  
20 her ability “to respond appropriately to and tolerate the pressures and expectations of a normal  
21 work setting.” AR at 214.

22 On reevaluation April 10, 2008, she diagnosed polysubstance dependence (in early  
23 remission), ADHD combined type, mood disorder NOS, anxiety disorder, and panic disorder  
24 with agoraphobia. AR at 230. At the time, plaintiff was reportedly “4 mos clean of meth” and



1 was interested in intensive outpatient program (“IOP”) drug treatment. *Id.* She opined that  
2 plaintiff had “marked” limitations in her ability “to understand, remember, and follow complex  
3 (more than two step) instructions,” “to relate appropriately to co-workers and supervisors,” and  
4 “to respond appropriately to and tolerate the pressures and expectations of a normal work  
5 setting,” and “severe” limitations in her ability “to control physical or motor movements and  
6 maintain appropriate behavior.” AR at 204.

7 On July 8, 2008, clinical psychologist Jeff Bremer, Ph.D., conducted a consultative  
8 psychological evaluation of the plaintiff. AR at 228-34. Dr. Bremer’s mental status examination  
9 indicated plaintiff was “hepped up” and “anxious,” but “reasonably tolerated a decidedly noisy  
10 examination setting.” AR at 230. “She seemed eager to please . . . [and] gave every indication  
11 of trying her best. Frustration tolerance and tolerance for ambiguity were good.” *Id.* Dr.  
12 Bremer found plaintiff’s “general level of intellectual functioning is solidly in the average, as  
13 reflected by [her] WAIS III scores.” AR at 231. Based on his examination, Dr. Bremer  
14 diagnosed plaintiff with major depression, panic disorder, amphetamine dependence (48 days  
15 reported remission), cannabis abuse (in reported remission), rule out ADHD, and personality  
16 disorder. AR at 233. He assigned her a global assessment of functioning (“GAF”)<sup>3</sup> score of 60,  
17 indicating moderate symptoms or moderate difficulty in social, occupation, or school  
18 functioning. DSM-IV-TR at 34.

19 On April 29, 2009, Keith Krueger, Ph.D., examined plaintiff and completed a DSHS  
20 psychological evaluation form. AR at 288-95. Dr. Krueger diagnosed plaintiff with  
21 amphetamine and cannabis dependence (in reported remission four months), anxiety disorder,

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23 <sup>3</sup> The GAF is a subjective determination based on a scale of 1 to 100 of “the clinician’s  
24 judgment of the individual’s overall level of functioning.” AM. PSYCHIATRIC ASS’N,  
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (Text. Rev., 4th ed. 2000)  
 (“DSM-IV-TR”).

1 personality disorder, and rule out ADHD. AR at 289. He opined that plaintiff had “marked”  
2 limitations in her ability “to interact appropriately in public contacts,” and “to respond  
3 appropriately to and tolerate the pressure and expectations of a normal work setting.” *Id.*

4 The ALJ rejected the opinions of Dr. Wheeler and Dr. Krueger because “the opinions are  
5 unsupported by the objective clinical findings and are inconsistent with the evidence considered  
6 as a whole.” AR at 25. Specifically, the ALJ noted that “Dr. Bremer’s mental status  
7 examination performed on July 8, 2008, was largely intact.” *Id.* “Dr. Bremer’s mental status  
8 examination showed that the [plaintiff] reasonably tolerated a decidedly noisy examination  
9 setting. She seemed eager to please; she gave every indication of trying her best; frustration  
10 tolerance and tolerance for ambiguity were good.” AR at 25.

11 The ALJ’s finding that the opinions of Dr. Wheeler and Dr. Krueger were not based on  
12 objective evidence is not supported by the record. Dr. Wheeler indicated that she relied, in part,  
13 on plaintiff’s test results on the Beck Anxiety Inventory (BAI), Trail-making test (TMT), mental  
14 status examination, and her objective observations. AR at 202, 206-211, 212, 216-23. Similarly,  
15 Dr. Krueger indicated that he relied on the Wechsler Adult Intelligence Scale-3d edition (WAIS-  
16 III) performed by Dr. Bremer, mental status examination, and Personality Assessment Inventory  
17 (PAI). AR at 288, 231-33, 291, 292-95. Thus, both Drs. Wheeler and Krueger supported their  
18 opinions with objective clinical findings.

19 Regarding the ALJ’s finding that the opinions of Dr. Wheeler and Dr. Krueger were  
20 “inconsistent with the evidence considered as a whole,” the Court finds that this reason is not  
21 specific, legitimate, or supported by substantial evidence. While the ALJ cites mental status  
22 examination findings and test scores by Dr. Bremer, these findings do not contradict the  
23 functional limitations assessed by Dr. Wheeler and Dr. Krueger, such as the ability to respond  
24

1 appropriately to and tolerate the pressures and expectations of a normal work setting.

2 Furthermore, the ALJ ignored Dr. Bremer's written discussion regarding his findings:

3 Ms. Johnson presents as a highly anxious, avoidant, recurrently depressed,  
4 separated, 26-year-old woman of solidly average intelligence whose primary  
5 limitation, with regard to work-related limitations, is (in her words) "people."  
6 She is highly avoidant. She doubts her own abilities to do virtually anything,  
7 relying on others, often at her peril. Self-esteem, at best, is fledgling.

8 Ms. Johnson is also recurrently depressed, leaving her even more isolated,  
9 withdrawn, and reclusive. There appeared to be a distinctly self-defeating quality  
10 to the many choices which predictably lead to her being harmed, neglected, and  
11 abused.

12 Ms. Johnson does not have learning disabilities in reading, writing, or math. Her  
13 reading and writing skills are entirely functional. She appears to have learned as  
14 much math, reading, and writing as would be expected, given her educational  
15 history. With some adult basic education, concurrent with psychiatric and  
16 psychotherapeutic support, she should be able to get a GED.

17 Ms. Johnson is fairly early – reportedly, 48 days – clean from methamphetamine.  
18 The importance of ongoing relapse prevention – including AA/NA sponsorship,  
19 and phase three treatment – cannot be over emphasized. She remains at  
20 reasonably high risk of relapse, given her tenuous and precarious psychiatric  
21 status.

22 Ms. Johnson does not present with "memory problems" per se. That said, I do not  
23 doubt that her abilities to attend to and concentrate on, and hence remember,  
24 varied stimuli varies as a function of perceived anxiety, stress, and depression.  
These cognitive capacities would be expected to increase with improved and  
continued psychiatric treatment.

AR at 233-34. Because Dr. Bremer did not provide an opinion regarding any specific functional  
limitations, it is not clear that his opinion contradicts the opinions of Drs. Wheeler and Krueger.  
The ALJ's reference to the opinion of Dr. Bremer is not substantial evidence or a specific and  
legitimate reason for giving less weight to the opinions of Dr. Wheeler and Dr. Krueger. On  
remand, the ALJ must reassess the opinions of Drs. Wheeler, Krueger, and Bremer.

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1           2. *New Medical Evidence*

2           On June 3, 2010, after the administrative hearing but before the ALJ issued his decision,  
3 Dr. Wheeler conducted a third evaluation of the plaintiff. AR at 352-64. Dr. Wheeler diagnosed  
4 plaintiff with methamphetamine, cannabis, and alcohol dependence in reported remission,  
5 anxiety disorder, personality disorder, and rule out ADHD. AR at 356. She noted that plaintiff's  
6 face, mouth, and forearms were covered with, what appeared to be, crystal methamphetamine  
7 sores. AR at 352, 357, 359, 360. Dr. Wheeler stated that "IF she is clean, then the level of  
8 anxiety is profound, and likelihood of ADHD is greater. She can't sit still, can't focus, rambles,  
9 limb movements are jerky and unregulated. Would never get hired in this state." AR at 359.

10           Plaintiff argues that the ALJ erred in failing to discuss this evidence. Dkt. No. 12 at 9.  
11 Although plaintiff transmitted Dr. Wheeler's psychological evaluation to the ALJ four days  
12 before the ALJ issued his decision – the record before the ALJ does not include Dr. Wheeler's  
13 evaluation, and there is no indication in the record that Dr. Wheeler's evaluation was received by  
14 the ALJ. AR at 29-32; Dkt. No. 17, App. 1. Plaintiff provided the additional evidence to the  
15 Appeals Council following the ALJ's June 18, 2010 decision. AR at 4-5, 8-9. After reviewing  
16 the additional evidence, the Appeals Council concluded that it did not provide a basis for  
17 reversing the ALJ's decision. AR at 1-2. Plaintiff asserts that this new evidence shows that the  
18 ALJ's decision is not supported by substantial evidence and is based on legal error. Dkt. No. 12  
19 at 22.

20           The Ninth Circuit has recently held that the Court may consider additional evidence  
21 submitted to the Appeals Council for the purposes of determining "whether, in light of the record  
22 as a whole, the ALJ's decision was supported by substantial evidence and was free of legal  
23 error." *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1232 (9th Cir. 2011) (citing  
24 *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993)). Here, however, the Court does not have

1 to decide whether Dr. Wheeler's psychological evaluation would justify a remand. Because this  
2 matter is being remanded, and these materials are part of the record, the ALJ should consider Dr.  
3 Wheeler's June 3, 2010 evaluation as part of his reevaluation of the medical evidence.

4 3. *Michael Regets, Ph.D.*

5 On September 29, 2008, State agency psychologist Dr. Regets reviewed the record and  
6 completed a Mental Residual Functional Capacity Assessment ("MRFC") of the plaintiff. (AR  
7 at 255-58.) In Section I of the MRFC, titled "Summary Conclusions," Dr. Lysak indicated  
8 plaintiff was "moderately limited" in her ability "to understand and remember detailed  
9 instructions," "to carry out detailed instructions," "to maintain attention and concentration for  
10 extended periods," "to sustain an ordinary routine without special supervision," "to work in  
11 coordination with or proximity to others without being distracted by them," "to complete a  
12 normal workday and workweek without interruptions from psychologically based symptoms and  
13 to perform at a consistent pace without an unreasonable number and length of rest periods," and  
14 "to interact with the general public." AR at 256.

15 In Section III, titled "Functional Capacity Assessment," Dr. Regets opined that plaintiff  
16 was capable of simple tasks and some detailed tasks, and was able to concentrate for two hours at  
17 a time. AR at 257. He stated that plaintiff would "do best if she remains clean and sober." *Id.*  
18 Regarding social functioning, Dr. Regets noted that plaintiff was capable of interacting with  
19 doctors and their staff, and that plaintiff would "do best working in a clean and sober work  
20 environment." *Id.*

21 Plaintiff argues that the ALJ failed to include in his RFC assessment all of the moderate  
22 limitations described by Dr. Regets in Section I of the MRFC. Dkt. No. 12 at 11-12. However,  
23 as explained in the agency's Program Operations Manual, an ALJ properly focuses on the  
24

1 “narrative” portion of the MRFC form, rather than the “Summary Conclusions” portion. *See*  
2 Program Operations Manual System (“POMS”) DI 25020.101(B)(1). The POMS provides,

3 The purpose of section I (“Summary Conclusion”) on the SSA-4734-F4-SUP is  
4 chiefly to have a worksheet to ensure that the psychiatrist or psychologist has  
5 considered each of these pertinent mental activities and the claimant’s or  
6 beneficiary’s degree of limitation for sustaining these activities over a normal  
7 workday and workweek on an ongoing, appropriate, and independent basis. **It is**  
8 **the narrative** written by the psychiatrist or psychologist **in section III**  
9 **(“Functional Capacity Assessment”)** of form SSA-4734-F4-SUP **that**  
10 **adjudicators are to use as the assessment of RFC.** Adjudicators must take the  
11 RFC assessment **in section III** and decide what significance the elements  
12 discussed in this RFC assessment have in terms of the person’s ability to meet the  
13 mental demands of past work or other work. This must be done carefully using  
14 the adjudicator’s informed professional judgment.

15 *Id.* It is clear that the ALJ acted in accordance with the agency’s established procedures when he  
16 relied on the narrative portion of Dr. Regets’ opinion set forth in the Functional Capacity  
17 Assessment rather than on the limitations recorded in the Summary Conclusions section.  
18 Accordingly, the ALJ properly evaluated Dr. Regets’ opinion.

19 4. *Allen Sinclair Chen, M.D., James F. Kruidenier, M.D., and Michael P. Myers, PA-C*

20 On October 18, 2008, Allen Sinclair Chen, M.D., conducted a consultative internal  
21 medicine examination of the plaintiff. AR at 273-77. Dr. Chen noted plaintiff could “ambulate  
22 down the hall and in the parking lot without any issues.” AR at 274. She was able to sit in the  
23 waiting room and during the examination with no discomfort. *Id.* She also had no trouble  
24 getting on or off the examination table or taking her shoes off. *Id.* Dorsolumbar straight leg  
raises were mildly positive bilaterally, and she had mild tenderness in her mid lower back. AR at  
276. She had 5/5 muscle strength throughout her upper and lower extremities with normal  
muscle bulk and tone. *Id.*

Based on his examination, Dr. Chen diagnosed plaintiff with low back pain with bilateral  
radicular symptoms. AR at 276. He opined that the number of hours plaintiff could stand, walk,

1 and sit in an eight-hour work day was without limitation. *Id.* He noted that plaintiff did not  
2 employ any assistance device, nor was any medically necessary. *Id.* He further found that the  
3 amount of weight plaintiff could lift and/or carry both frequently and occasionally was without  
4 restrictions. *Id.* He opined that plaintiff had some mild postural limitations on bending,  
5 stooping, and crouching, and could perform these frequently; limitations were secondary to  
6 decreased range of motion. *Id.* He opined that plaintiff had no limitations on reaching, handling,  
7 feeling, grasping, and fingering. *Id.*

8 James F. Kruidenier, M.D., examined plaintiff on March 31, 2010, for possible diagnosis  
9 of hepatitis C. AR at 315-17. Dr. Kruidenier noted plaintiff had been drinking 20-40 ounces of  
10 beer a day up until about one week ago, and had been using drugs up until about one year ago.  
11 AR at 315. He reported that plaintiff had probable hepatitis C, and that it would be important for  
12 her to maintain alcohol and drug abstinence. AR at 316-17.

13 On August 13, 2007 and April 2, 2008, physician's assistant Michael P. Myers, PA-C,  
14 completed a DSHS physical evaluation form. AR at 241-44, 250-52. He diagnosed plaintiff  
15 with bipolar disorder, attention deficit disorder ("ADD"), and endometriosis. AR at 243, 250.  
16 He opined that these conditions caused moderate limitations in her ability to lift, handle, carry,  
17 hear, communicate, and understand or follow directions. *Id.* He further opined that plaintiff was  
18 limited to sedentary work.<sup>4</sup> *Id.*

19 Plaintiff argues that the ALJ improperly discredited Mr. Myers' opinion. Under the  
20 regulations, physicians' assistants are considered "other sources," not "acceptable medical  
21 sources." 20 C.F.R. § 404.1513(d)(1); SSR 06-03p. Accordingly, the ALJ could reject his  
22 opinion by providing germane reasons. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

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23 <sup>4</sup> Sedentary work "means the ability to lift 10 pounds maximum and frequently lift and/or  
24 carry such articles as files and small tools. A sedentary job may require sitting, walking and  
standing for brief periods." AR at 243, 250.

1 The ALJ discredited Mr. Myers' opinion that plaintiff was limited to sedentary work as  
2 he indicated that her limitations would last 90 days to 12 months, and as such did not establish  
3 disability for a continuous period of 12 months. AR at 23, 244, 252. This is not a germane  
4 reason to reject Mr. Myers' opinion. While it may be relevant to whether plaintiff's disability is  
5 for a closed period, it is not probative of Mr. Myers' opinion about plaintiff's impairments and  
6 limitations.

7 Next, the ALJ stated that Mr. Myers' opinion is generally consistent with the RFC  
8 assessment. AR at 23. The ALJ does not explain how a limitation to sedentary work is  
9 consistent with a RFC finding that she could perform light work. Accordingly, this is not a  
10 germane reason to discredit Mr. Myers' opinion.

11 Finally, the ALJ discredited Mr. Myers' opinion that plaintiff was limited to sedentary  
12 work as Dr. Chen's examination did not support plaintiff's allegations of serious back pain, there  
13 was no evidence of motor, sensory, or reflex loss, and she has not required surgery. *Id.* This is a  
14 germane reason to reject Mr. Myers' opinion that plaintiff was limited to sedentary exertion.  
15 Although Dr. Chen found plaintiff had low back pain with bilateral radicular symptoms, which  
16 caused some mild postural limitations secondary to decreased range of motion – he opined that  
17 these symptoms did not interfere with plaintiff's ability to stand, walk, sit, lift and/or carry  
18 frequently and occasionally. AR at 276. Inconsistency with the record is a germane reason for  
19 discrediting lay testimony. *See, e.g., Bayliss*, 427 F.3d at 1218 (holding inconsistency with  
20 medical evidence is a germane reason for discrediting lay testimony); *Lewis v. Apfel*, 236 F.3d  
21 502, 512 (9th Cir. 2001) (contradictory medical records supported ALJ's rejection of lay  
22 testimony as to symptoms). Although plaintiff has urged an alternative interpretation of the  
23 record, the ALJ did not err in his assessment of Mr. Myers' opinion.



1 Plaintiff also argues that the ALJ erred by “failing to acknowledge that Dr. Kruidenier’s  
2 diagnosis of Hepatitis C is objective medical evidence which supports Johnson’s allegations of  
3 fatigue.” Dkt. No. 12 at 13. The ALJ is not required to discuss all evidence presented to him.  
4 *See Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984) (citing *Lewin v. Schweiker*, 654 F.2d  
5 631, 634 (9th Cir. 1981)). The ALJ need only explain why “significant probative evidence has  
6 been rejected.” *Cotter v. Harris*, 642 F.2d 700, 706 (3rd Cir. 1981). Here, the ALJ did not reject  
7 Dr. Kruidenier’s opinion, but found plaintiff had Hepatitis C based on his diagnosis. AR at 16.  
8 The ALJ was not required to discuss evidence he did not reject. While Hepatitis C may cause  
9 fatigue, Dr. Kruidenier made no objective findings to support such a medical conclusion and did  
10 not express that opinion. Thus, although plaintiff has been diagnosed with Hepatitis C, there is  
11 nothing objective to confirm this is the source of plaintiff’s fatigue complaints. The Court  
12 declines to find that the ALJ erred by “failing to acknowledge that Dr. Kruidenier’s diagnosis of  
13 Hepatitis C is objective medical evidence which supports Johnson’s allegations of fatigue.”

14 B. The ALJ Erred in Evaluating Plaintiff’s Credibility

15 A determination of whether to accept a claimant’s subjective symptom testimony requires  
16 a two step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281. First, the ALJ  
17 must determine whether there is a medically determinable impairment that reasonably could be  
18 expected to cause the claimant’s symptoms. *Id.* Once a claimant produces medical evidence of  
19 an underlying impairment, the ALJ may not discredit the claimant’s testimony as to the severity  
20 of symptoms solely because it is unsupported by objective medical evidence. *Bunnell v.*  
21 *Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc). Absent affirmative evidence showing that  
22 the claimant is malingering, the ALJ must provide “clear and convincing” reasons for rejecting  
23 the claimant’s testimony. *Smolen*, 80 F.3d at 1284.

1 When evaluating a claimant's credibility, the ALJ must specifically identify what  
2 testimony is not credible and what evidence undermines the claimant's complaints; general  
3 findings are insufficient. *Id.* The ALJ may consider "ordinary techniques of credibility  
4 evaluation" including a reputation for truthfulness, inconsistencies in testimony or between  
5 testimony and conduct, daily activities, work record, and testimony from physicians and third  
6 parties concerning the nature, severity, and effect of the symptoms of which he complains. *Id.*

7 In this case, there was no evidence that plaintiff was malingering. Consequently, the ALJ  
8 was required to provide clear and convincing reasons to reject her testimony. The ALJ found  
9 plaintiff's medically determinable impairments could reasonably be expected to cause her  
10 alleged symptoms, but that her statements concerning the intensity, persistence, and limiting  
11 effects of these symptoms were not credible. *Id.* The ALJ offered two reasons to support this  
12 decision: (1) plaintiff's daily activities were inconsistent with her alleged functional limitations,  
13 AR at 23, and (2) plaintiff's subjective complaints regarding her alleged functional limitations  
14 were not supported by the objective clinical findings, AR at 19.

15 The ALJ erred in finding plaintiff's daily activities – "bath[ing], chang[ing] clothes,  
16 eat[ing], attend[ing] meetings," performing "household chores" and "car[ing] for 2 children" –  
17 were inconsistent with her alleged functional limitations. AR at 23. The Ninth Circuit "has  
18 repeatedly asserted that the mere fact that a plaintiff had carried on certain daily activities . . .  
19 does not in any way detract from her credibility as to her overall disability.'" *Orn*, 495 F.3d at  
20 639 (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) ("One does not need to be  
21 'utterly incapacitated' in order to be disabled.")). Daily activities may be grounds for an adverse  
22 credibility determination only if (1) the activities contradict the claimant's other testimony, or (2)  
23 the activities "meet the threshold for transferable work skills." *Id.* "The ALJ must make  
24 'specific findings relating to [the daily] activities' and their transferability to conclude that a

1 claimant's daily activities warrant an adverse credibility determination." *Id.* (quoting *Burch v.*  
2 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)).

3 Here, the ALJ did not make any specific findings that plaintiff's daily activities were  
4 transferable to a work setting, or contradicted any of her other testimony. Although the ALJ  
5 correctly noted that "[t]he performance of household chores and other daily activities may be  
6 considered in evaluating the credibility of the claimant's functional limitations," AR at 23, the  
7 ALJ failed to specify which of plaintiff's alleged functional limitations was contradicted by  
8 which of plaintiff's daily activities, committing legal error.

9 In addition, the ALJ erred in relying on a lack of support from the objective medical  
10 evidence to reject plaintiff's testimony. As stated above, once a claimant has produced medical  
11 evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to  
12 the severity of symptoms solely because it is unsupported by objective medical evidence.  
13 *Bunnell*, 947 F.2d at 343; *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986) ("[I]t is  
14 improper as a matter of law for an ALJ to discredit excess pain testimony solely on the ground  
15 that it is not fully corroborated by objective medical findings."). Because the ALJ concluded  
16 that plaintiff's degenerative disc disease, Hepatitis C, depression, and anxiety constituted severe  
17 impairments, the ALJ could not thereafter discredit plaintiff's testimony regarding the severity of  
18 her symptoms solely because her testimony was unsupported by objective medical evidence.  
19 Because the ALJ's other reason for rejecting plaintiff's testimony fails, the lack of corroborating  
20 objective medical evidence alone cannot support the adverse credibility finding.

21 Accordingly, the Court finds that the reasons proffered by the ALJ are not clear and  
22 convincing reasons for discrediting plaintiff's testimony as to the severity of symptoms. On  
23 remand, the ALJ should reassess plaintiff's testimony and provide clear and convincing reasons  
24 for rejecting it should such a conclusion be warranted.

1 C. The ALJ Erred in Assessing Plaintiff's Residual Functional Capacity.

2 As discussed above, the ALJ erred in his assessment of the medical evidence requiring  
3 remand. Accordingly, on remand, after properly evaluating the medical evidence, the ALJ will  
4 reevaluate plaintiff's RFC.

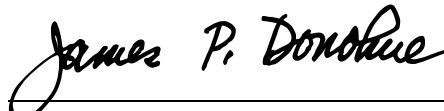
5 D. The ALJ Erred in Posing a Hypothetical to the Vocational Expert.

6 Finally, plaintiff argues that the ALJ erred in finding she was able to perform the jobs of  
7 photocopy machine operator, office cleaner, and laundry press operator because the hypothetical  
8 posed to the vocational expert ("VE") did not include all of her limitations. Because the Court  
9 recommends remand for further consideration of the medical evidence and the RFC, the ALJ will  
10 necessarily have to conduct a new step five analysis that incorporates any changes in plaintiff's  
11 RFC. If the ALJ's RFC assessment is revised, the ALJ will also call a VE to testify about jobs  
12 that may exist with a properly framed hypothetical that incorporates all of plaintiff's limitations.

13 VIII. CONCLUSION

14 For the foregoing reasons, the Court recommends that this case be REVERSED and  
15 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's  
16 instructions. A proposed order accompanies this Report and Recommendation.

17 DATED this 30th day of April, 2012.

18   
19 JAMES P. DONOHUE  
20 United States Magistrate Judge  
21  
22  
23  
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